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Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Tolen Information Services

**File:** B-240979; B-240981

**Date:** December 21, 1990

Steve Tolen for the protester.  
Benny R. Henson, National Credit Union Administration, for the agency.  
Scott H. Riback, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protests are sustained where contracting agency makes award of contracts based on initial offers to other than the lowest overall cost offeror.

### DECISION

Tolen Information Services protests the award of two contracts to Brick & Associates, Inc. under request for proposals (RFP) Nos. NCUA-90-R-0006 (RFP No. 0006) and NCUA-90-R-0007 (RFP No. 0007), issued by the National Credit Union Administration (NCUA). RFP No. 0006 is for services in connection with the conduct of asset-liability training courses, and RFP No. 0007 is for the acquisition of asset-liability management simulation model software licenses. Tolen argues as to both acquisitions that the agency improperly favored Brick in its evaluation of proposals and also that it improperly made award to Brick at prices higher than those offered by Tolen. We sustain the protests on the ground that the agency improperly made award of the contracts on the basis of initial proposals to other than the firm offering the lowest overall cost to the government.

The RFPs both called for the submission of firm, fixed-price offers and contemplated award to the firm submitting the proposal deemed most advantageous to the government. RFP No. 0006 assigned a weight of 50 percent to two cost evaluation criteria and 50 percent to four technical evaluation criteria. RFP No. 0007 assigned a weight of 30 percent to cost and 70 percent to four technical evaluation criteria.

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NCUA received five initial proposals under each RFP and, thereafter, point scored both cost and technical aspects of the proposals. On the basis of the initial cost and technical scores, NCUA made award to Brick under each RFP as the firm submitting the proposal deemed most advantageous to the government. Under both RFPs, Brick was the second-low offeror, and Tolen submitted the low offers.<sup>1/</sup>

We find both awards to be improper because they were made on the basis of initial offers to other than the lowest overall cost offeror. Under Federal Acquisition Regulation (FAR) § 15.610(a)(3), a contracting agency may make an award on the basis of initial proposals where the competition or prior cost experience demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government.<sup>2/</sup> Where, however, it appears that acceptance of an initial proposal will not result in the lowest overall cost to the government, the agency is not free to award on an initial proposal basis, but instead must conduct discussions in an attempt to obtain the lowest overall cost or otherwise determine the proposal most advantageous to the government. AMP, Inc., B-239287, Aug. 16, 1990, 90-2 CPD ¶ 131; Hartridge Equip. Corp.--Recon., B-228303.2, May 24, 1988, 88-1 CPD ¶ 491. Stated differently, an agency is precluded from making award on the basis of initial offers to any firm other

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<sup>1/</sup> Under RFP No. 0007, Brick appeared to be the low-priced offeror. However, upon receiving the award document, Brick became aware of the fact that the agency had evaluated its offer based upon its per-unit price. The parties then apparently engaged in price discussions which resulted in Brick's offering a lower per-unit price. However, the dollar amount of Brick's overall offer and the award was substantially higher than the price offered by Tolen.

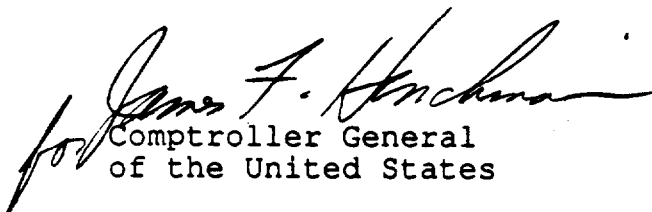
<sup>2/</sup> The NCUA is an independent agency within the executive branch, 12 U.S.C. § 1752a(a), and is thereby subject to our bid protest jurisdiction. See Computer Support Sys., Inc., B-239034, Aug. 2, 1990, 69 Comp. Gen. \_\_\_, 90-2 CPD ¶ 94. The NCUA does not, however, conduct its acquisitions pursuant to the Federal Property and Administrative Services Act, 41 U.S.C. § 251 et seq. (1988), which the FAR implements. The agency procures goods and services pursuant to separate statutory authority. See 12 U.S.C. § 1766(i)(2) (1988). The NCUA Board's stated policy is that "the NCUA shall comply with the Federal Acquisition Regulation and all other applicable requirements in procuring goods and services" with certain specified exceptions. We will therefore apply the applicable FAR provisions in deciding Tolen's protest.

than the one offering the lowest overall cost to the government, if the low offeror is technically acceptable or susceptible of being made acceptable.

Here, the record shows that Tolen's offered prices on the two RFPs were lower than the prices offered by Brick. Furthermore, there is nothing in the record that shows that the agency found Tolen technically unacceptable. Under these circumstances, we conclude that the awards were improper and, consequently, we sustain the protests.

Since the protest was not filed within 10 days of the award, performance was not suspended. However, the record shows that the agency has issued only one delivery order for a course outline at no charge to the government. Additional task orders would be issued in fiscal years 1991, 1992 and 1993 for teaching the courses. In light of the foregoing, we are by separate letter of today recommending to the Chairman of the National Credit Union Administration that the agency reopen the subject acquisition, engage in discussions with all firms which submitted offers under the RFPs and request BAFOs from all firms<sup>3/</sup>, or in the alternative award the contracts to Tolen as the low, technically acceptable offeror, if otherwise appropriate. We further recommend that if, after the evaluation of BAFOs, NCUA determines that a firm other than Brick is properly in line for award, we further recommend that the contracts awarded to Brick be terminated for the convenience of the government and award be made to the appropriate firm.<sup>4/</sup> In addition, we find Tolen to be entitled to the costs of filing and pursuing its protests. 4 C.F.R. § 21.6(d)(1) (1990).

The protests are sustained.

  
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<sup>3/</sup> The record does not establish that any of the firms responding to the RFPs were outside the competitive range.

<sup>4/</sup> Because of our recommendation we need not consider the protester's allegations concerning the propriety of the agency's evaluation since Tolen may receive the award or NCUA will necessarily be required to reevaluate proposals.